AHMED ABDUL RAHMAN

v.

SPK-SENTOSA CORP BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-04-60 OF 1996]
3 SEPTEMBER 1998

CIVIL PROCEDURE: *Appeal - Record of appeal - Non-enclosure of documents - Whether appeal record defective - Whether in breach of court procedure - Whether notice and record of appeal to be set aside - Rules of the Court of Appeal 1994, r. 18(10)*

LABOUR LAW: *Employment - Unfair dismissal - Award of Industrial Court - Sufficiency - Industrial Court only giving award for backwages - Whether a proper order - Whether appellant also entitled to other benefits spelt out in contract of service*

Before the Industrial Court, Ahmed Abdul Rahman ('the appellant') was held to be unlawfully dismissed by the first respondent ('Sentosa') and a sum of RM336,000, being the appellant's claim for backwages, was awarded to the appellant. The Industrial Court, however, refused to make further awards in respect of the appellant's other claims. Both the appellant and Sentosa applied to the High Court for *certiorari* to quash the tribunal's decision and, upon the High Court affirming the award, appealed to the Court of Appeal.

Before the learned judges, the appellant argued, in essence, that both the Industrial Court and the High Court were wrong in their respective orders, as he was also entitled in law to be awarded compensation in respect of his contractual gratuity and bonuses, EPF contributions etc. The facts also showed that Sentosa's appeal record herein did not contain: (i) a copy of the notice for an order of *certiorari*; (ii) a copy of the order granting leave by the High Court; (iii) the relevant 'notis usul'; and (iv) the chronology of events as required by r. 18(10) Rules of the Court of Appeal 1994. The appellant also sought to set aside the notice of appeal and the appeal record pertaining to Sentosa's appeal, arguing that Sentosa, in not furnishing the documents in the record, was in breach of procedure.

Held:
Per Mokhtar Sidin JCA

[1] It was obvious that when the record of appeal was filed by Sentosa's solicitors, the solicitor in charge of the appeal had not left the firm yet and that all the documents were available to her. The appellant's solicitors had also been kind enough to point out the breaches to her then, but she did nothing to remedy them until the motion in encl. 10a was filed. The solicitors for Sentosa had thus not been vigilant and had committed the breaches as pointed out by the appellant's solicitors. The court must therefore allow the appellant's motion and dismiss Sentosa's appeal.

[2] As for the claims in Table A, Item 1 thereof had been awarded by the Industrial Court and confirmed by the High Court and as such the figure would stand. The claim in Item 2 in respect of the appellant's contractual gratuity ought also to be allowed as the entitlement was denied because of the wrongful dismissal. Allowed too was his claim for contractual bonus amounting to RM144,000 to which he was clearly entitled under the contract, and the claim for EPF contributions amounting to RM117,000, which Sentosa conceded. The appellant's claim for RM36,000 for paid annual leave, however, must be dismissed as that claim could only be made when the appellant actually went on leave while in Sentosa's service.

[3] As for the appellant's claims for contractual benefits in Table B, it was clear that the claims ought to be supported by evidence. No such evidence was forthcoming from the appellant and the claims must therefore fail. For the same reason, the appellant's claims in Table D, ie, in respect of his contractual benefits but for the next two years when he is deemed to exercise his option, ought to be rejected as well.

[4] As for the claims in Table C, Item 1 thereof, which was the salary for the notional two years, and Item 2, which was the contractual gratuity for two years, should both be allowed. The appellant was however not entitled to the payment of bonus in Item 3, such payment being too remote.

[Appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Di hadapan Mahkamah Perusahaan, responden pertama ('Sentosa') telah didapati melakukan pembuangan kerja dengan secara tidak sah terhadap Ahmed bin Abdul Rahman ('perayu'), dan mahkamah berikutan itu membenarkan award tunggakan gaji sebanyak RM336,000 kepada perayu. Mahkamah Perusahaan bagaimanapun enggan memberikan apa-apa award terhadap tuntutan-tuntutan perayu yang selainnya. Kedua-dua perayu dan Sentosa telah memohon kepada Mahkamah Tinggi untuk perintah *certiorari* bagi membatalkan keputusan tribunal dan, berikutan award tersebut disahkan oleh Mahkamah Tinggi, merayu kepada Mahkamah Rayuan.

Di hadapan hakim-hakim yang bijaksana, perayu berhujah, secara intinya, bahawa kedua-dua Mahkamah Perusahaan dan Mahkamah Tinggi telah silap dalam perintah yang dibuat oleh mereka masing-masingnya, kerana beliau juga berhak di sisi undang-undang untuk dipampas bagi tuntutan-tuntutan beliau berhubung gratuiti dan bonus kontraktual, berhubung sumbangannya dalam KWSP dan lain-lain. Fakta juga menunjukkan bahawa rekod rayuan Sentosa di sini tidak mengandungi (i) sesalinan notis untuk perintah *certiorari*; (ii) sesalinan perintah memberi kebenaran oleh Mahkamah Tinggi; (iii) notis usul yang relevan; dan (iv) kronologi peristiwa di bawah A. 18(10) Kaedah-kaedah Mahkamah Rayuan 1994. Dalam halkeadaan sedemikian, perayu selanjutnya memohon untuk mengenepikan notis and rekod rayuan berkaitan rayuan Sentosa, dengan mengemukakan hujah bahawa Sentosa telah melanggar prosedur apabila gagal mengepilkan dokumen-dokumen di atas dalam rekod rayuannya.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Adalah nyata bahawa apabila rekod rayuan difailkan oleh peguamcara Sentosa, peguam yang mengendalikan rayuan belum lagi meninggalkan firma guaman itu dan mempunyai semua dokumen yang perlu. Peguamcara perayu juga sangat bertolak ansur apabila bertindak menjelaskan tentang pelanggaran-pelanggaran tersebut kepada peguamcara Sentosa, tetapi pihak yang terkemudian langsung tidak berbuat apa-apa untuk memperbaiki keadaan sehinggalah usul dalam Kandungan 10a difailkan. Peguamcara Sentosa dengan itu adalah tidak berwaspada dan telah melakukan pelanggaran prosedur sepertimana yang dikatakan oleh peguamcara perayu. Dengan hal yang demikian mahkamah harus membenarkan usul perayu dan seterusnya menolak rayuan Sentosa.

[2] Berhubung tuntutan perayu dalam Jadual A, Item 1 di dalamnya telah diawardkan oleh Mahkamah Perusahaan dan disahkan oleh Mahkamah Tinggi dan tuntutan tersebut harus dikekalkan. Tuntutan dalam Item 2 berhubung dengan gratuiti kontraktual perayu juga harus dibenarkan, oleh kerana tuntutan tersebut menjadi tertolak disebabkan oleh pemecatan salah berkenaan. Harus juga dibenarkan ialah tuntutan untuk bonus kontraktual berjumlah RM144,000 di mana perayu jelas berhak di bawah kontrak, dan tuntutan untuk sumbangan KWSP berjumlah RM117,000 yang diperakui oleh Sentosa. Tuntutan perayu bagi cuti tahunan dibayar, bagaimanapun, perlu ditolak oleh kerana tuntutan sedemikian hanya boleh dibuat apabila perayu memang bercuti semasa dalam perkhidmatan Sentosa.

[3] Berhubung tuntutan perayu untuk manafaat-manafaat kontraktual dalam Jadual B, ianya jelas bahawa tuntutan berkenaan perlu dibuktikan melalui keterangan. Tiada keterangan dimajukan oleh perayu untuk tujuan ini dan tuntutan tersebut seharusnyalah gagal. Atas alasan yang sama, tuntutan perayu dalam Jadual D, iaitu berhubung manafaat-manafaat kontraktual tetapi yang berkaitan dengan dua tahun selepas itu di mana beliau dianggap sebagai telah melaksanakan opsyennya, harus juga ditolak.

[4] Berhubung tuntutan dalam Jadual C, kedua-dua Item 1 dan Item 2nya, iaitu masing-masingnya gaji untuk 2 tahun notional dan gratuiti kontraktual untuk 2 tahun, harus dibenarkan. Perayu bagaimanapun tidak berhak kepada pembayaran bonus dalam Item 3. Tuntutan berkenaan sudah terlalu jauh atau remote.

[Rayuan dibenarkan; perintah sekadarnya.]

Cases referred to:

Alloy Automotive Sdn Bhd v. Enkei Automotive Co Ltd & Anor [1997] 2 CLJ 392 ***(foll)***

Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 ***(foll)***

Legislation referred to:

Rules of the Court of Appeal 1994, r. 18(10)

For the appellant - Su Tiang Joo (S Sivaneindiren with him); M/s Cheah Teh & Su
For the respondents - Nurul Akmar Omar (Haris Mohd Ibrahim with her); M/s Adam & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion Nos: R2-25-125 of 1995 & R1-25-124 of 1995]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

In respect of Appeal No. W-04-60-96 the appellant is Ahmed bin Abdul Rahman while the respondents are SPK-Sentosa Corporation Berhad and Mahkamah Perusahaan Malaysia. In respect of Appeal No. W-04-59-96 the appellant is SPK-Sentosa Corporation Berhad and the respondent is Ahmed bin Abdul Rahman. These appeals had been fixed for hearing at the same time. As such for matter of convenience and to avoid any confusion we will refer to Ahmed bin Abdul Rahman as the appellant, SPK-Sentosa Corporation Berhad as the 1st respondent and Mahkamah Perusahaan Malaysia as the 2nd respondent. The 2nd respondent are not concerned with the outcome of these appeals and as such no one represented them at the hearing.

These appeals arose from two separate originating summonses filed by the appellant and the 1st respondent against Award No. 263/95 made by the 2nd respondent. Since there were two separate applications, each application was given a separate reference number. The High Court ordered the two originating summonses be heard together, whereupon it dismissed both applications and confirmed Award No. 263/95 made by the 2nd respondent. When the appeals came before us, they were accompanied by two motions, one by the appellant dated 9 July 1997 (encl. 10a) and the other by the 1st respondent dated 23 April 1998 (encl. 14a).

The appellant's motion is to strike out the notice of appeal and the appeal record filed by the 1st respondent. The 1st respondent's motion is for an extension of time to file a supplementary record of appeal and chronology of events. With the consent of both parties, we heard the two motions together as the outcome of one will also determine the other.

Mr. T.J. Su, counsel for the appellant, submitted that the order under appeal is dated 30 July 1996 and the 1st respondent filed its notice of appeal on 28 August 1996. It then obtained an extension of time to file its record of appeal. A letter dated 21 January 1997 from the court informed the 1st respondent that the notes of evidence and grounds of judgment were ready. There is no evidence when the 1st respondent received the letter and as such the letter is deemed to have been received on 21 January 1997. Mr. Su submitted further that by virtue of that letter, the 1st respondent was to file the record of appeal on or before 21 February 1997. On 5 February 1997, solicitors for the 1st respondent sent the draft index to the appellant's solicitors (p. 30 of encl. 14a). The appellant's solicitors realised that the draft index was sent in respect of originating summons No. R2-125-95 when it was intended for

originating summons No. R2-124-95. On the same date, ie, on 5 February 1997 the appellant's solicitors spoke to the 1st respondent's solicitors and pointed out the mistake and followed it up with a letter dated 5 February 1997. There was no reply to this letter but instead solicitors for the 1st respondent proceeded to file the appeal record on 13 February 1997. Mr. Su indicated that had the 1st respondent's solicitors come back to him, he might be able to assist the 1st respondent in enclosing the necessary documents. Since solicitors for the 1st respondent did not do so they became authors of their own problems.

Under the circumstances, Mr. Su contended that the 1st respondent's appeal record is defective and no attempt had been made to rectify such defect. In applying to set aside the notice of appeal and the record of appeal filed by the 1st respondent, the appellant cited the following breaches committed by the 1st respondent:

(a) Failure to provide a draft index for the approval of the appellant's solicitors.

(b) Failure to include in the record of appeal a copy of the notice of motion for an order of *certiorari.*

(c) Failure to include in the record of appeal a copy of the order granting leave by the High Court dated 15 January 1996.

(d) Failure to include in the record of appeal the 'Notis Usul' dated 18 January 1996.

(e) Failure to comply with r. 18(10) of the Rules of the Court of Appeal 1994 requiring the filing of a chronology of events.

In her reply, Cik Nurul Akmar Omar, counsel for the 1st respondent who was also the solicitor in charge of this appeal, admitted the breaches as enumerated by the appellant's counsel. As to the draft index she explained that after the appellant's solicitors spoke to her, she amended the draft index but by mistake sent the draft to her own client instead of sending it to the appellant's solicitors. As to the other breaches she explained that she was having some problems with her firm of solicitors and as a result she left that firm but subsequently came back to the firm and was asked to handle the appeal again. She came to know about the breaches when she saw the motion (encl. 10a) and this prompted her to file the motion (encl. 14a).

It is difficult for us to accept her explanation because it is clear to us that when the record of appeal was filed she had not left the firm yet. It is obvious to us that all the documents were available to her. The faults were with her because she was the one who had handled the file then as evidenced by the correspondences that took place. It is clear that she was not vigilant.

It has been made clear that solicitors should at all times be vigilant and alert and also take regard to the rules as stated in the case of *Alloy Automotive Sdn. Bhd. v. Enkei Automotive Co. Ltd. & Anor* [1997] 3 MLJ 205 where Abu Mansor, JCA, in delivering the judgment of the court, at p. 209 said:

> This court viewed that there was a blatant disregard by the appellant's solicitors of the court's procedure. It is also the view of this court that to a certain extent, the appellant could not escape and was partly to blame for the delay in the filing of the appeal record. The appellant, we feel, should have been more vigilant and alert as to the state of its pending matter. We feel the appellant should have the attentiveness to check on the action of the solicitors it employed and paid for. If the case was delayed, the appellant should have pursued the matter as a diligent litigant and even to the extent of firing its solicitors and changing to a new solicitor who could do a better job. After all, it was paying and had the right to call the tune. The appellant was the master and the solicitors were only its agent. We could not subscribe and sympathize with the appellant's counsel's submission that his client presumes everything was in order until the letter from the Court of Appeal dated 29 June 1995.

In the case of *Soh Keng Hian v. American International Assurance Co. Ltd.* [1996] 1 MLJ 191 it was held:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But, it is not an unprincipled discretion. There must be some relevant evidential material made available before the court may exercise discretion.
>
> In the present case, there was no reasonable explanation for the failure to serve and the delay in approaching this court. Having taken into account all that could be said in favour of the appellant, and weighing it against all the other circumstances of the case, and also, having considered all the relevant circumstances, the court found that it was unable to exercise discretion in the appellant's favour.

It is clear that solicitors for the 1st respondent had committed the breaches pointed out by the appellant's solicitors. From the record it is also clear that the appellant's solicitors had been kind enough to point out those breaches to her but she did nothing to remedy them until the motion encl. 10a was filed.

That being the case we had no alternative but to allow the appellant's motion at encl. 10a with costs and that consequently Appeal No. W-04-59-1996 is dismissed with costs. The deposit made by the 1st respondent in respect of that appeal is to be paid to the appellant towards his taxed costs. In view of our decision, the 1st respondent's motion at encl. 14a is also dismissed with costs.

Main Appeal No. W-04-60-1996

Mr. S. Siva, counsel for the appellant submitted that the present appeal is only in respect of the quantum awarded by the 2nd respondent which was confirmed by the High Court. (The 2nd respondent had awarded the appellant's claim for backwages for the period of two years and four months totalling RM336,000. No other amount had been awarded because no receipts had been produced).

For the purpose of this appeal four tables identified as Table A, Table B, Table C and Table D were produced. Table A are claims by the appellant in respect of benefits expressly provided for and quantifiable in his contract of service for the initial period of three years. There are five items under this heading. **Item 1** had been awarded by the Industrial Court and confirmed by the High Court. As such that figure will stand. **Item 2** is the contractual gratuity upon completion of three years. Counsel for the appellant submitted that the appellant at the time of dismissal was only eight months short of three years which would entitle him to this benefit. He was denied of this entitlement because of the wrongful dismissal. The 1st respondent's counsel did not respond to this. For that reason we allowed this claim and the amount be paid to the appellant. **Item 3** is a claim for the sum of RM144,000 in respect of contractual bonus for three years. Appellant's counsel contended that the appellant is entitled to it under the contract. Again there was no response from the 1st respondent and as such we allowed that amount. **Item 4** is the claim for Employees Provident Fund contribution amounting to RM117,000. The 1st respondent conceded to this claim and we allowed it. **Item 5** is a claim for paid annual leave for the sum of RM36,000. It is obvious that the claim could only be made when the appellant actually went on leave while in the service of the 1st respondent. This must be supported by evidence. No such evidence was given and as such we rejected this claim.

Table B is in respect of all benefits for the initial period expressly provided for under the contract of employment and quantifiable through evidence. Though it was admitted by the 1st respondent's secretary that the appellant was entitled to those benefits, it is clear to us and to the court below that the claims under this table must be supported by evidence. These were the claims that were rejected by the 2nd respondent. No evidence had been adduced by the appellant that he hired a car or a chauffeur or produced the premiums paid by him for personal accident and health insurance. On that basis we rejected the appellant's claims in respect of these benefits. **Table D** are claims in respect of the same items as Table B but for the notional next two years when he is deemed to exercise his option under his contract to continue in the same post on the expiry of the initial three years. For the same reasons we have rejected the appellant's claim under Table B, we also rejected the claims by the appellant under Table D.

The claims in **Table C** are the same as those claimed in Table A. As stated by the appellant's counsel these claims will arise when the appellant exercises the option to be employed for another two years at the expiry of the first three years' employment. It was submitted that the time for the option had passed and if the appellant was not unlawfully dismissed he would have exercised the option. Further it was submitted that the option is not remote because when the hearing before the 2nd respondent took place the date to exercise the option had passed. We are of the opinion that the appellant is entitled to Item 1 which is the salary for the notional two years and Item 2 which is the contractual gratuity for two years. We are of the opinion that the appellant is not entitled to Item 3 which is the bonus. Payment of bonus by a company depends on its performance and the profits it makes. Since there is no evidence to that effect, we consider this claim to be too remote. For the same reason as we had rejected Item 5 under Table A, we also rejected the claim under Item 5 of Table C. As for Item 4 which is the claim for EPF contribution, we were mindful of rejecting it but counsel for the respondent conceded and stated that the appellant is entitled to it. For that reason we allowed the claim under this item.

For the above reasons we allowed the appellant's appeal and confirm his entitlements to be as follows:

Table A: Item 1 which has been awarded by the Industrial Court is confirmed. Items 2, 3 and 4 are allowed. Item 5 is disallowed.

Table B: The whole claims are disallowed.

Table C: Claims under Items 1, 2 and 4 are allowed. Claims under Items 3 and 5 are disallowed.

Table D: Tho whole claims are disallowed.

We are mindful that we have allowed full costs to the appellant in his motion and in the dismissal of the 1st respondent's appeal. As such for this appeal, we allowed 1/2 costs to him here and in the court below and the deposit is to be refunded to him. At the request of the appellant's counsel, all payments in respect of this appeal are to be made to the appellant's solicitors.